that the aforesaid Rules were outdated and that the same had been amended so that both the Notice of Appeal and the docketing of the case must be completed within the same ninety (90) day period following the entry of the Judgment in the Court of Appeals.

7. That the aforesaid mistake was entirely your deponent's fault and was occasioned by his failure to properly examine into the applicable Rules of the Supreme Court.

8. That after your deponent's initial examination of the Rules he diaried this matter on his personal calendar for preparation of the Jurisdictional Statement during the week of October 26th, on the assumption that he had until December 2, 1970, for filing of the same.

9. That on October 24th your deponent discovered his error and discovered that it was also beyond the allowable time for an application to extend the period for docketing pursuant to Rule 13.1 and Rule 34.2 of the Supreme Court Rules.

10. That your deponent had several conversations during the period from July 2, 1970, to October 24, 1970, with Mr. Ronald Crowley, Esq., the attorney for the Appellee herein, and it was apparently Mr. Crowley's understanding that the Appellant had a one hundred and fifty (150) day period within which to docket this matter.

11. That your deponent's inattention to the docketing requirements was somewhat aggravated by the fact that his attention on this file was concentrated on a Motion for a New Hearing and Reconsideration of the dispositional Order which your deponent brought in Family Court, pursuant to Section 761 of the New York Family Court Act.

12. That said Motion required the execution of Motion papers and the presentation of oral argument and that to date this Motion remains undecided by the Family Court.

13. That your deponent takes sole responsibility for

the failure to docket the case within the period prescribed by the applicable Rules but respectfully requests that this Court waive said Rule so as to consider on the merits the serious constitutional questions that are presented on this appeal.

14. That the infant Appellant in no way aided or abetted your deponent's error and that the rights which are at stake and to be resolved by this Court are serious and substantial in nature.

15. That to allow the docketing of this case at this time would in no way work to the detriment of the interests of the County of Onondaga and is, in fact, requested by said County of Onondaga.

Dennis G. O'Hara
DENNIS G. O'HARA

(Sworn to October 26, 1970).

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Supreme Court of the United States

October Term, 1970

953

In the Matter of

Daniel Richard D., a Person Alleged to be a Juvenile Delinquent.

DANIEL RICHARD D.,

Appellant,

v.

COUNTY OF ONONDAGA,

Appellee.

On Appeal From The State Of New York Court of Appeals

MOTION TO DISMISS OR AFFIRM

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May 1971

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Supreme Court of the United States

October Term, 1970

In the Matter of

Daniel Richard D., a Person Alleged to be a Juvenile Delinquent.

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Appellee.

On Appeal From The State Of New York Court of Appeals

MOTION TO DISMISS OR AFFIRM

OPINION BELOW

The Opinion of the State of New York, Court of Appeals, is reported in 27 N.Y.2d 90; 313 N.Y.S.2d 704. A copy of such Opinion and of the Remittur of the State of New York Court of Appeals, dated July 2, 1970, are set forth in Appendix A of Appellant's Jurisidictional statement at length.

JURISDICTION

This proceeding was commenced under Article 7 of the New York Family Court Act with the filing of a petition in Family Court, Onondaga County, alleging that the appellant was a juvenile delinquent on January 29, 1969. The Judgment of the State of New York Court of Appeals sought to be

reversed was dated and entered July 2, 1970, and a Notice of Appeal to the Supreme Court of the United States was filed with the Clerk of the State of New York Court of Appeals on July 20, 1970.

The Appellant seeks to have this Decision reviewed by direct appeal as conferred by Title 28, United States Code, Section 1257(2). The Appellee takes the position that it is in the absolute discretion of this Court to allow such appeal when counsel for the Appellant has not timely docketed an appeal although Notice of Appeal was timely filed.

However, the Appellee takes the further position that this Court should dismiss the Appeal or Affirm the State of New York Court of Appeals Decision on the grounds that there are no Substantial Federal Questions presented by the Appeal.

STATEMENT OF FACTS

On Friday, January 24, 1969 the body of Joseph C. Davoli was discovered at his residence in Fayetteville, New York. Mr. Davoli was an apparent homicide victim. His fifteen (15) year old son, Daniel Richard Davoli, who is the Respondent, was taken into custody by members of the New York State Police Department and was thereafter transferred to Hillbrook Detention Home.

On Monday, January 27, 1969 the juvenile was brought before a Family Court Judge of Onondaga County who determined, pursuant to Section 728 of the Family Court Act, that he had jurisdiction over the matter.

On Wednesday, January 29, 1969 a Petition, No. D-55-69, was filed in Family Court, Onondaga County. The Petition alleged that Respondent committed an act, which, if done by an adult, would constitute the crime or crimes of Murder in violation of Section 125.25 of the Penal Law of the State of New York. These allegations were denied by the Respondent.

Thereafter, counsel for the Respondent commenced several habeas corpus proceedings. Such proceedings were not put in issue on the prior appeal, and therefore the County deems it unnecessary to discuss the factual circumstances surrounding such habeas corpus proceedings.

The juvenile's attorneys moved for a jury trial on March 5, 1969 and moved by a Notice of Motion, dated March 7, 1969 for an Order requiring: (1) that the County Attorney, County of Onondaga, serve upon the attorneys for the Appellant, pursuant to Section 813-f of the Code of Criminal Procedure, a written notice of intention to offer a confession or admission in evidence upon the trial of the Appellant if such was their intention; and (2) that the County Attorney, County of Onondaga, establish that the Appellant committed the acts alleged in the Petition by proof beyond a reasonable doubt.

After denial of the above-mentioned motions, counsel for Appellant requested an adjournment of the Family Court proceedings to permit him to apply for a formal stay of the proceedings from Justice Henry of the Appellate Division, Fourth Department. Justice Henry denied the application for a stay of the proceedings. Thereafter the juvenile's attorney requested an additional adjournment of the proceedings to permit him to bring a proceeding in Federal District Court. The Family Court Judge denied the request for such an adjournment and ordered that a "fact-finding hearing" be commenced immediately.

Thereafter, on March 13, 1969, immediately preceding the "fact-finding hearing", the County Attorney in open Court recommended that the Petition before the Court be dismissed and a new petition be substituted. The County Attorney made this recommendation only after discussions off the record with the Court and Appellant's counsel at the latter's request. The Court thereafter dismissed the Original Petition and accepted a New Petition, Docket No. D-116-69, which alleged that the Appellant had committed an act which, if committed by an adult, would constitute a crime

of Reckless Endangerment in the first degree in violation of Section 120.25 of the Penal Law of the State of New York. The Court informed the juvenile of his rights and requested him to admit or deny the New Petition. The Appellant in open Court, and upon the advice of his counsel, admitted the allegations contained in the Petition. The Court immediately thereafter ordered and adjudged that the Appellant be adjudicated a Juvenile Delinquent and ordered that a social investigation be conducted.

On April 3, 1969 a dispositional hearing was held. Upon the conclusion of such hearing the Court ordered the juvenile committed to the New York State Agricultural & Industrial School at Rochester, New York for a period not to exceed three (3) years.

A Notice of Appeal to the Appellate Division of the Supreme Court was filed on April 22, 1969 and that Court by a written decision, Henry J., dissenting, reversed the Family Court, remitting the matter to Family Court, Onondaga County by order of the Appellate Division dated April 9, 1970. The Appellee filed a Notice of Appeal to the State of New York Court of Appeals on April 17, 1970. The matter was argued before the New York Court of Appeals and a decision by that Court reversing the Appellate Division, Fourth Department, and reinstating the Order of the Family Court was rendered July 2, 1970.

STATUTES INVOLVED

All Sections of the Family Court Act set forth herein are set forth in Volume 29A of McKinney's Consolidated Laws of New York:-Part 1.

Section 711 of the Family Court Act provides as follows:

> "The purpose of this article is to provide a due process of law (a) for considering a claim that a person is a juvenile delinquent or a person in need of supervision and (b) for devising an appropriate

order of disposition for any person adjudged a juvenile delinquent or in need of supervision."

Section 744 (b) of the Family Court Act provides as follows:

"(b) Any determination at the conclusion of a fact-finding hearing that a respondent did an act or acts must be based on a preponderance of the evidence. For this purpose, an uncorroborated confession made out of court by a respondent is not sufficient." As amended L. 1963, c. 529, §12, eff. April 23, 1963.

Section 752 of the Family Court Act provides as follows:

"If the allegations of a petition under this article are established in accord with part three, the court shall enter an order finding that the respondent is a juvenile delinquent or a person in need of supervision and shall state the grounds for the finding."

Section 781 of the Family Court Act provides as follows:

"No adjudication under this article may be denominated a conviction, and no person adjudicated a juvenile delinquent or a person in need of supervision under this article shall be denominated a criminal by reason of such adjudication."

Section 782 of the Family Court Act provides as follows:

"No adjudication under this article shall operate as a forfeiture of any right or privilege or disqualify any person from subsequently holding public office or receiving any license granted by public authority."

Section 813-f of the Code of Criminal Procedure found in McKinney's Consolidated Laws of New York, Volume 66 Part 3 - page 107 of the Supplement Packet Pact, provides as follows:

"In a case where the people intend to offer a confession or admission in evidence upon a trial of a

defendant, the people must, within a reasonable time before the commencement of the trial, give written notice of such intention to the defendant, or his counsel if he is represented by counsel." Added L.1965, c.846, §1, eff. July 16, 1965.

QUESTIONS PRESENTED

1. Whether or not an individual is entitled to a jury trial as to the determination of his being a juvenile delinquent under Article 7 of the New York State Family Court Act.

2. Whether or not this Courts' Decision as set forth in the Case of In Re Winship, 397 U.S. 358, in which it was held that an adjudication of juvenile delinquency must be based upon proof beyond a reasonable doubt, should be given retroactive application.

3. Whether or not a plea of guilty constitutes a waiver by a juvenile delinquent of his right to appeal.

4. Whether or not a separate hearing before a separate judge concerning the voluntariness of an alleged confession must be given to a juvenile before a fact finding hearing can be had as to such juvenile's being adjudicated a juvenile delinquent.

ARGUMENT

Question 1. Right of a juvenile to a Jury Trial.

The Appellant was not entitled to a Jury Trial as to the determination of his being a Juvenile Delinquent pursuant to Article 7 of the New York State Family Court Act.

The Sixth Amendment to the Constitution of the United States guarantees among other rights the right to a speedy and public trial. The Fourteenth Amendment denies the states the power to deprive a person of liberty without due

process of law. No distinction is made in either constitutional mandate of the Sixth or Fourteenth Amendments between an adult and a juvenile.

Article 1, Section 2 of the New York State Constitution provides that "Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever; . . . "

It is further provided in Article 6, Section 13 of our state constitution that "The Family Court shall have jurisdiction over .... (1) the protection, treatment, correction and commitment of those minors who are in need of the exercise of authority of the court because of circumstances of .... delinquency."

The Family Court had its inception in The Court Reorganization Acts of 1962. Article 7 of the Family Court Act governs proceedings concerning juvenile delinquency. Its purpose was declared to be "to provide a due process of law (a) for considering a claim that a person is a juvenile delinquent or a person in need of supervision.... " (Section 711). Under Article 7 there is no provision that the adjudication of juvenile delinquency must be made by a jury; rather this determination is made by the Family Court Judge.

The Appellee submits that the criteria adopted by the Supreme Court in In Re Gault, 387 U.S. 1; In Re Winship, 397 U.S. 358; and Duncan v. State of Louisiana, 391 U.S. 145 are not dispositive of the issue of whether or not an adjudication of juvenile delinquency must be made by a jury.

In Re Gault did not discuss the issue of jury trials; Winship concerned itself with the theory of proof beyond a reasonable doubt and Duncan did not involve a juvenile delinquent proceeding.

The guarantee of a jury trial has never been extended to a juvenile such as in the instant case, nor has the rationale of the Cases above cited. The Appellee submits that

the right to a jury trial for a juvenile is not a fundamental right applicable to the States and is not consistent with the concept of a juvenile court (People v. Anonymous, 56 Misc. 2d 725; New York Constitution Art. 1, Sec. 2.).

The dissenting opinions of Chief Justice Burger and Justice Stewart of the United States Supreme Court in In Re Winship are a more reasoned approach to this entire problem of juvenile delinquency. The decision In Re Winship dealt with the burden of proof issue but the rationale as expressed in the dissenting opinion is none the less applicable to the jury trial issue:

> "What the juvenile court systems need is not more but less of the trappings of legal procedure and judicial formalism; the juvenile system requires breathing room and flexibility in order to survive, if it can survive the repeated assaults from this Court.
>
> Much of the judicial attitude manifested by the Court's opinion today and earlier holdings in this field is really a protest against inadequate juvenile court staffs and facilities; we "burn down the stable to get rid of the mice." The lack of support and the distressing growth of juvenile crime have combined to make for a literal breakdown in many if not most juvenile courts. Constitutional problems were not seen while those courts functioned in an atmosphere where juvenile judges were not crushed with an avalanche of cases.
>
> My hope is that today's decision will not spell the end of a generously conceived program of compassionate treatment intended to mitigate the rigors and trauma of exposing youthful offenders to a traditional criminal court; each step we take turns the clock back to the pre-juvenile court era. I cannot regard it as a manifestation of progress to

transform juvenile courts into criminal courts, which is what we are well on the way to accomplishing." (Supra, 4259)

Appellee contends, therefore, that the New York State Court of Appeals did not err in denying the juvenile's right to a jury trial in the Family Court Proceedings.

Question 2. Whether In Re Winship should be given retroactive application.

In March of 1970 this Court held by its decision in In Re Winship, 397 U.S. 358, that an adjudication of juvenile delinquency should be based upon proof beyond a reasonable doubt.

Appellee submits that this ruling should be prospective only in application. This would be in accord with the Supreme Court decision in DeStafana v. Woods, 392 U.S. 631, and Debacker v. Brainard, 396 U.S. 28, in which the majority of the Court has agreed that they would not apply the holding in Duncan v. Louisiana, (Supra) to any cases which were pending in state courts prior to the Duncan decision. Therefore in view of the fact that the present case was pending in Family Court of Onondaga County prior to the Supreme Court decision in Matter of Winship, (Supra), that decision would not apply to any proceedings concerning the case at bar.

Question 3. Does a plea of guilty by the Appellant constitute a waiver of his right to appeal.

The law of the State of New York is well established that a defendant may plead to a reduced charge as long as the charge to which the defendant pleads is within the jurisdiction of the court in which the defendant is appearing; that such plea is made with full knowledge of the charge and is made with the advice and consent of the defendant's attorney and while the defendant has the capacity to make such

a plea. In this light it was held by the New York Court of Appeals in People v. Foster (19 N.Y. 2d, 150, 154) that a plea "sought by the defendant and freely taken as part of a bargain which was struck for the defendant's benefit" will be sustained even if "there may be a question whether it is technically and logically consistent." (Supra, 154; see, also; People ex rel. Welch v. Wallach, 27 A.D. 2d, 873; Mot. for lv. to app granted 19 N.Y. 2d, 582, citing People v. Foster, (Supra); People v. Hutson, 28 A.D. 2d, 571; People v. Rossi, 28 A.D. 2d, 619; People v. Toliver, 29 A.D. 2d, 210)

It is the Appellee's contention that a juvenile, upon the facts presented in the instant case, is entitled, upon the advice of counsel to freely plead to a charge of juvenile delinquency if such plea is on the basis of a bargain sought by his counsel and for his benefit. If he does not make a decision to accept such a bargain, his election to proceed on the original charge preserves for him by appeal the right to raise any questions as deprivation of due process of law under the federal and state constitutions.

Question 4. Is Section 813-f of the Code of Criminal Procedure inapplicable to Juvenile Delinquency proceedings under Article 7 of the Family Court Act.

During the course of proceedings in Onondaga County Family Court the Appellant sought to have the County Attorney give written notice if he intended to use any confession or admission at the time of trial. Appellant's counsel also requested a "Huntley Hearing". Both of these motions were denied by the Family Court Judge. Appellee submits that the denial of these motions did not constitute a denial of appellant's rights to due process of law.

The Code of Criminal Procedure does not apply to proceedings in Family Court. (Code of Crim. Proc. Section 11;

Report of Joint Legislative Committee on Court Reorganization, 1962, p. 5; McKinney's Session Law, 1962, p. 3433)

The only case which has dealt specifically with Section 813-f of the Code of Criminal Procedure is Matter of Williams where it was held that Section 813-f of the Code of Criminal Procedure was inapplicable to juvenile delinquency proceedings. (49 Misc. 2d, 154, 158, Fam. Ct. Ulster County [1966]; see, also, Matter of Edwin R., 60 Misc. 2d 355, Fam. Ct. N.Y. County [1969])

Therefore it is Appellee's contention that denial of Appellant's motion for a separate hearing on the voluntariness of an alleged confession did not deprive the Appellant of any rights under the due process provision of the United States or New York State Constitutions.

CONCLUSION

The Appellee contends that there has been no violation of the Appellant's rights of due process under the United States Constitution or the New York State Constitution, on any of the grounds set forth in the Appellant's Jurisdictional Statement and therefore the Appellant's appeal should be dismissed and the decision of the New York State Court of Appeals as set forth in Matter of D. (Daniel), 27 N.Y. 2d 90; 313 N.Y.S. 2d 704, be affirmed in its entirety.

Respectfully Submitted,

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On Behalf Of
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AFFIDAVIT OF SERVICE OF THE NOTICE OF APPEAL.

In the Matter of

Daniel Richard D., a Person Alleged to be a Juvenile Delinquent.

DANIEL RICHARD D., Appellant,

v.

COUNTY OF ONONDAGA, Appellee.

STATE OF NEW YORK)
COUNTY OF ONONDAGA) SS:
CITY OF SYRACUSE)

I, PATRICIA ANN SOUTHERN, a secretary in the office of Eli Gingold, Attorney for the County of Onondaga, Appellee herein, depose and say that on the 27th day of May, 1971, I served copies of the foregoing Notice to Dismiss or Affirm on Verner R. Love, Jr., Esq., of the firm of Mackenzie, Smith, Lewis, Michell & Hughes, Attorneys for the Appellant, by mailing a copy, in a duly addressed envelope, with postage prepaid, to Verner R. Love, Jr., Esq., of the firm of Mackenzie, Smith, Lewis, Michell & Hughes at their offices located at 600 Onondaga County Savings Bank Building, Syracuse, New York.

s/ PATRICIA ANN SOUTHERN

Subscribed and sworn to
before me this 27th day
of May, 1971.

s/ RONALD J. CROWLEY
Notary Public